No. 12946

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,

Appellant,

vs.

MANDEVILLE ISLAND FARMS, INC., a corporation, ROSCOE C. ZUCKERMAN and G. K. EVANS,

Appellees.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This appeal is taken from those portions of a judgment of the District Court for the Southern District of California awarding treble damages, attorney's fees and costs under Section 4 of the Clayton Act, 15 U. S. C., Section 15, to the plaintiffs in two consolidated actions. Appellees Mandeville Island Farms, Inc., and Roscoe C. Zuckerman were the plaintiffs in Action No. 4643-BH below [R. 3], and G. K. Evans was the plaintiff in Action No. 8353-BH [R. 154]. The order consolidating the two actions was made at the commencement of the trial. [R. 305.]

Jurisdiction.

As indicated above, the jurisdiction of the District Court was primarily invoked under Section 4 of the Clayton Act. [Mandeville-Zuckerman complaint and amended complaint, R. 3, 54; Evans Complaint, R. 154; Finding 1, R. 251.] Diversity of citizenship and jurisdictional amounts under 28 U. S. C., Section 1332, were also appropriately alleged. [R. 3, 54, 154; Findings 2(a), 2(b), 2(c), 4, R. 251-252.]

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1291, the appeal being taken from specified portions of a final judgment and decision of the District Court. [R. 277-278.]

The statutes hereinabove mentioned are believed to sustain the respective jurisdictions of this Court and of the District Court, and they constitute the basis upon which appellant contends the District Court had jurisdiction below, and this Court has jurisdiction to review the judgment appealed from.

Statement of the Case.

1. *Basic Facts.* This controversy centers around a change in the method utilized by defendant and appellant, a beet sugar manufacturer, in determining the price to be paid to growers for sugar beets grown under contract with appellant in an area which supplied sugar beets for appellant's Clarksburg, California, factory. Both prior and subsequent to the crop years[1] of 1939, 1940 and 1941

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[1]A crop year or season comprises a period of twelve months, commencing on August 1 of the calendar year whose number it bears. References to given years hereinafter found in this brief will be understood to refer to crop years.

appellant's growers were paid on the basis of a contract formula comprising two variable price determination factors: (1) the percentage sugar content of the beets grown by the particular grower, and (2) the average net return[2] received from sugar (a) manufactured at appellant's Clarksburg, California factory, and (b) sold during the crop year in question [Finding 8, R. 258; Ex. A, R. 76]; in other words, what may be termed a *single net* method, measured by net returns from sugar from appellant's own factory.

During what we may term the critical years of 1939, 1940 and 1941, however, the second variable of the formula was changed to the average net return received from sugar (a) manufactured at the factories of the three sugar companies operating in Northern California (*i. e.*, appellant and its two competitors in that area), and (b) sold during the crop year in question [Findings 9(b), 9(e), R. 260, 261; Exs. B, C and D, R. 83, 90, 96]; in other words, what may be termed a *joint net* method, measured by the averaged net returns from sugar from, not appellant's factory alone, but of the factories of each of the three companies operating in the Northern California area. Appellees each grew and sold beets to appellant during specified years of this three-year period.

The Court found that this joint net method was the result of a combination and conspiracy on the part of

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[2]The factors going to make up the net return are (1) the gross receipts from sugar sold during a given crop year, less (2) deducted expenses, which comprised federal excise tax, freight on sugar to destination and sales and marketing expense items, all as detailed for the years 1938 through 1942 in the tabulated exhibit reproduced in the appendix hereto.

appellant and its two competitors, that it eliminated competition between the three manufacturers in the purchase of sugar beets, that it deprived the beet growers of a reasonable price for their beets, that it illegally fixed the price of sugar beets, that it intentionally hindered and obstructed the free and natural flow in the purchase of sugar beets and that an illegal monopoly had been established during the three critical years[3] in which it was in operation. [Findings 9, 11, 12, 13, 19, R. 259, 262, 267.]

2. *Interstate Commerce.* It will have been noted that the restraints found all relate to the sugar *beets,* which the District Court in turn found [R. 256] "were planted, grown, harvested and processed into sugar *wholly within the State of California,*" and not to the *sugar* manufactured from the beets. As to the *sugar,* the Court found that it "was, during all of such period, sold in interstate commerce throughout the United States." [R. 255.]

This situation is of interest because the District Court, for reasons which will be discussed later herein, not only failed to find, but steadfastly refused to find, that the activities complained of had any effect whatever on interstate commerce, or any effect whatever upon the price, supply or competitive conditions with reference to *sugar,* the only interstate commodity involved in the case. Indeed, the District Court made it amply evident that if a finding on this subject had been made, it would have been that the activities complained of did *not* affect interstate commerce. [R. 810, 811.]

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[3]As indicated above, the single net method came back into use in 1942. [Finding 13, R. 262.]

The question is therefore presented as to whether or not, absent a finding as to any effect upon interstate commerce, the findings support the judgment of violation of the anti-trust laws; or, to use the terminology of Rule 52, Federal Rules of Civil Procedure, whether or not the judgment of violation directed to be entered was an *appropriate* judgment in the absence of a finding that the activities complained of had a substantial economic effect upon interstate commerce. This question will be discussed in the body of the brief.

3. *Past History of the Litigation.* This litigation has had an interesting and curious history. This is the second time the Mandeville-Zuckerman case has been before this Court. (159 F. 2d 71, sub. nom. *Mandeville Island Farms, Inc. and Roscoe C. Zuckerman v. American Crystal Sugar Company,* No. 11266, affirming judgment on motion to dismiss granted by the District Court, 64 Fed. Supp. 265.) The history of the *Mandeville* case in its early stages in the District Court and through this Court was accurately portrayed in the dissenting opinion of Mr. Justice Jackson (Mr. Justice Frankfurter concurring) when the case reached the Supreme Court. (*Mandeville Island Farms, Inc. and Roscoe C. Zuckerman v. American Crystal Sugar Company,* 334 U. S. 219.)

Mr. Justice Jackson there said:

> "It appears to me that the Court's opinion is based on assumptions of fact which the petitioner disclaimed in the Court below. These assumptions are permissible inferences from the amended complaint only if we disregard the way in which the amendments came about.

"On hearing, the trial judge apparently considered that a cause of action would be stated only if the complaint alleged that the growing contracts affected the price of sugar in interstate commerce. *But the contracts accompanying the pleadings indicated that the effects ran in the other direction. The market price of interstate sugar was the base on which the price of beets was to be figured. The latter price was derived from the income which respondent and others received from sugar sold in the open market over the period of a year.*[4] The trial judge therefore suggested that the references to restraint of trade in sugar in interstate commerce created an ambiguity in the complaint. Accordingly, the plaintiff, at the suggestion of the court and for the specific purpose of this appeal, filed an amended complaint which completely eliminated the charge that the agreements complained of affected the price of sugar in interstate commerce, and eliminated the two other counts 'to enable the Court herein to pass upon the sufficiency of the first count on its merits and, further, to make possible a speedy and inexpensive review by appeal if the Court held that the first count was insufficient.' The District Court then held that since no beets whatever moved in interstate commerce and since there was no charge in the amended complaint that the cost or quality of the product which did move in interstate commerce was in any way affected, no cause of action was stated. The appeal was taken and the Circuit Court of Appeals affirmed." (334 U. S. 246-249; footnote omitted.)

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[4]Emphasis here, as elsewhere, is supplied unless otherwise noted.

The foregoing appraisal of the situation is amply borne out by the record herein. [R. 314-316; and see R. 285-303.]

We thus perceive that the District Court granted appellant's original motion to dismiss on the theory that a price-fixing of beets alone was charged as distinguished from a charge of restraint as to sugar, the interstate product. This Court affirmed on the same theory. The Supreme Court, however, adopted appellees' argument that since sugar *was* the only interstate product, the allegation in Paragraph IX of the amended complaint [R. 61] as to a conspiracy "to unlawfully monopolize and restrain trade and commerce among the several states and to unlawfully fix prices to be paid the growers of sugar beets"[5] did charge a restraint as to the *sugar* (334 U. S. at pp. 244-246), despite the accuracy of Mr. Justice Jackson's appraisal of the true situation.

The materiality of this past history lies in the fact that the Supreme Court did not pass upon the complaint from the standpoint of a pleading charging, without more, a restraint as to a farm product which never crossed state lines. Still less did it pass upon the situation revealed by the undisputed *evidence* in this case, adduced after the reversal and remand, which was to the effect that the stabilization of the price of sugar beets had no effect whatever upon the price, supply or competitive conditions as to *sugar* [R. 694, 720]; evidence which appellees did not even attempt to refute.

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[5]Originally characterized by appellees as a monopoly and restraint of trade and commerce in *sugar and sugar beets* among the several states and to unlawfully fix the price of sugar beets. [Complaint, Par. XI, R. 11.]

4. *The District Court's Interpretation of the Supreme Court's Decision and its Refusal to Find as to the Issue of Effect Upon Interstate Commerce.* Following the reversal and remand of the case, the District Court adopted the view that the decision of the Supreme Court rendered on the *pleadings,* constituted the law of the case as to the fact, *without necessity of proof,* of liability under the anti-trust laws; and that therefore nothing remained for it to do but to fix the damages. [See, for instance, Memorandum Opinion at R. 226; Conclusion of Law 3, R. 270; remarks of court at R. 804.]

Entertaining the view that this factual question had been decided for it in advance, the District Court steadfastly refused to make *any* finding as to the effect of the activities complained of upon interstate commerce. At the same time, it candidly made it clear that if it *had* made a finding upon the subject, it would have found that the combination with reference to the ~~best~~ BEET prices *had no effect* upon interstate commerce.

This latter fact is evidenced by the court's own remarks [R. 810, 811] and by the fact that it eliminated every finding on the subject which was proposed in earlier drafts of the findings save one, which apparently crept into the final draft by iadvertence; and that one finding was then stricken by the court on motion of appellant. [R. 274-276.]

5. *Damages.* The District Court, as damages for the years 1939 and 1940 (Mandeville), awarded the difference, trebled, between the price per ton of beets actually paid

under the joint net method for those years, and the average of the prices per ton paid to growers in the crop years 1937 and 1938 for beets of the same sugar content under the single net method. For 1941 (Zuckerman and Evans), the award was a flat 25¢ per ton of beets delivered, trebled. It was and is the contention of appellant that the proper measure, had liability been established, would have been the trebled difference between what the respective appellees actually had been paid under the joint net method for 1939 and 1940, as to Mandeville, and for 1941, as to Zuckerman and Evans, and what they respectively would have received had the single net method been used for those years, the figures as to which were stipulated to and made available to the court. It was and is further contended by appellant that since the amounts which they would have received under the single net method for the very years in question were proven to the penny, any recourse to the figures of other years, or any utilization of a flat figure per ton was unnecessary, excessive and prejudicial. Under the findings it is perfectly obvious that all that the appellees were deprived of were the advantages of the efficiency of the processor with which they dealt as reflected in its higher single net *when it was higher* (than the computed joint net). It necessarily follows that the proper measure could only have been the difference as to each year, between what the appellees respectively received under the joint net and what they would have received under the single net; all as is hereinafter discussed.

Specification of Errors.

With all respect, the District Court erred in the following particulars:

1. In rendering judgment for appellees and against appellant.

2. In holding and deciding that the decision of the Supreme Court on the prior appeal in *Mandeville Island Farms, Inc., et al. v. American Crystal Sugar Company,* 334 U. S. 219, relieved appellees of the necessity of proving (as distinguished from alleging) that the activities complained of had a substantial economic effect upon interstate commerce.

3. In failing to find as to the issue of whether or not the activities complained of had a substantial economic effect upon interstate commerce.

4. In failing to find that the activities complained of had no effect upon interstate commerce.

5. In awarding damages in the amounts specified in the judgment.

6. In its application of the measure of damages.

7. In failing to hold that the proper measure of damages was the excess, if any, trebled, and as to each of the three years involved, of the amounts which appellees severally would have received under the single net method of price determination, over what they actually received when paid under the joint net method; and

8. In failing to apply such proper measure.

SUMMARY OF ARGUMENT.

I.

The District Court Erred in Rendering Judgment for Appellees and Against Appellant.

A. The District Court erred in holding and deciding that the decision of the Supreme Court on the prior appeal in *Mandeville Island Farms, Inc. v. American Crystal Sugar Company* (334 U. S. 219) relieved appellees of the necessity of proving (as distinguished from alleging) that the activities complained of had a substantial economic effect upon interstate commerce.

1. The holding on the prior appeal was that the Mandeville amended complaint stated a cause of action under the Sherman Act; it in no way dispensed with the necessity of proving such cause of action.

B. The conclusions of law and judgment against appellant are not supported by the findings.

1. In order to warrant a recovery in a treble damage suit under the Sherman Act, a plaintiff must plead and prove, and the trial court must find, that the activities complained of as having caused him damage, had a substantial economic effect upon interstate commerce.

2. The District Court here declined to make any finding whatever as to the issue of effect upon interstate commerce; and it repeatedly eliminated or deleted findings proposed by appellees as to that issue.

3. If the District Court had found that the activities complained of had a substantial economic effect on interstate commerce, such findings would have been clearly erroneous as being contrary to the undisputed evidence.

(a) The undisputed evidence was that the activities complained of had no effect whatever upon the price, supply or competitive conditions with reference to sugar, the only interstate product involved in the case.

II.

The District Court Erred in Awarding Damages in the Amounts Specified in the Judgment.

A. The District Court erred in its application of the measure of damages.

1. The correct measure of damages is the difference (trebled) between the amounts actually realized by appellees, during the three crop years involved, from the sale of their beets to appellant, and what would have been realized by them during such period in the absence of the combination complained of.

2. Translated to the facts of these cases, and assuming, for purposes of discussion only, that injury from a Sherman Act violation was both proved and found, the proper measure is the excess, if any, trebled, and as to each of the three years involved, of the amounts which appellees would severally have received had they been paid for their beets upon the basis of appellant's own (single) net return from sugar sold from its Clarksburg factory, over the amounts which they severally did receive when paid upon the basis of the joint net returns from sugar sold from appellant's Clarksburg factory and from the factories operated by the two other sugar companies in northern California.

(a) These are not cases where appellant's acts have prevented appellees from making precise proof of their damages; the amount of such damages, ascertained by the measure properly applicable to these cases, was proven to the penny.

B. The damages actually awarded were speculative and inconsistent.

ARGUMENT.

I.

The District Court Erred in Rendering Judgment for Appellees and Against Appellant.

A. The District Court Erred in Holding and Deciding That the Decision of the Supreme Court on the Prior Appeal in Mandeville Island Farms, Inc. v. American Crystal Sugar Company (334 U. S. 219) Relieved Appellees of the Necessity of Proving (as distinguished From Alleging) That the Activities Complained of Had a Substantial Economic Effect Upon Interstate Commerce.

1. The Holding on the Prior Appeal Was That the Mandeville Amended Complaint Stated a Cause of Action Under the Sherman Act; It in No Way Dispensed With the Necessity of Proving Such Cause of Action.

What the Supreme Court did was, in effect, to overrule a demurrer. Reversing a granted motion to dismiss amounts to nothing else. In such a case, that Court, precisely as the District Court had done, was compelled to take the *then* undenied allegations of the complaint as true. That it did so on the prior appeal is amply evident from the majority opinion itself, bearing in mind that it also interpreted the complaint as charging a restraint as to the sugar recognized by Mr. Justice Rutledge as "the only interstate commodity." We quote:

> *"The material facts pleaded, which stand admitted as if they had been proved for the purposes of this proceeding may be summarized as follows:"* (334 U. S. at p. 222.)
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> * * * * * * * *
>
> "Little more remains to be said concerning the amended complaint. *The allegations comprehend all that we have set forth."* (334 U. S. at p. 244.)

Clearly, the Court was dealing with facts *alleged,* and with nothing else.

After the Supreme Court's ruling, appellant answered, denying the material allegations of the complaints. The question now is, not what appellees had *alleged,* but what they have *proved* under the Supreme Court's holding, which in actuality was that the Mandeville complaint stated a cause of action. This simply meant that the burden still remained on appellees to prove their case at the trial as to all material allegations controverted by the pleadings. And not the least of these was the point blank denial that there had been any restraint of trade in interstate commerce, which is to say, as to *sugar.* [Compare amended complaint, Par. IX, R. 61, *et seq*; Par. XII, R. 64-65; Par. XIX, R. 71-72, with answer, Par. 5, R. 127 *et seq.*]

In other words, the rule here has full application that a determination by an appellate court that a complaint states a cause of action constitutes the law of the case[6] only to the extent that the allegations thereof, deemed to be true on the former appeal, are substantiated by *proof.* (*Aaron v. Hopkins* (5 Cir.), 63 F. 2d 804, 805; *Page v. Arkansas National Gas Corporation* (8 Cir.), 53 F. 2d 27, 31; *City of Sedalia v. Shell Petroleum Corporation* (8 Cir.) 81 F. 2d 193, 196; *Archer v. City of Los Angeles*, 19 Cal. 2d 19, 29; *Allen v. Calif. Mutual Bldg. & Loan Assoc.,* 22 Cal. 2d 474, 482; *Abroms v. N. Y. Life Ins. Co.,* 64 Cal. App. 2d 449, 456.)

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[6]We recognize, of course, that the doctrine of the law of the case here has strict application only to the *Mandeville-Zuckerman* causes of action. However, since the District Court treated the Supreme Court holding binding *in toto* [R. 270], the discussion is also apt as to the *Evans* case.

The case last cited accurately states the rule as follows:

> "However, in giving consideration to the decision on the prior appeal to determine the extent to which the law of the case therein announced is applicable in determining the instant controversy it must be borne in mind that the former appeal was from a judgment based upon an order sustaining a demurrer to the complaint without leave to amend. *In that proceeding, being upon demurrer, it was required that the truth of the allegations contained in the complaint be assumed.* Acting upon that assumption, this court held on the former appeal that the complaint stated a cause of action, ordered that the demurrer be overruled and that the proffered amended complaint be filed. *But, unless the evidence adduced at the trial proved the allegations of the complaint which was considered upon the former appeal, the doctrine of the law of the case does not apply.* In other words, if the trial court was justified, as we are persuaded it was, in holding that appellants' evidence failed to substantiate the allegations of the complaint and the amended complaint, then the decision of this court in passing upon the demurrer interposed to the original complaint *was not binding upon the trial court as the law of the case, nor is it binding upon this court on this appeal, in passing upon the sufficiency of the evidence to support the allegations of the pleadings* (*Allen v. California Mutual Building & Loan Association,* 22 Cal. (2d) 474, 481, 482 [139 P. 2d 321]; *Archer v. City of Los Angeles,* 19 Cal. 2d 19, 29 [119 P. 2d 1]." (64 Cal. App. 2d at p. 456.)

It was in this latter respect that the District Court erred in its interpretation of the scope and effect of the holding of the Supreme Court on the vital issue as to whether the activities complained of had the substantial economic effect upon interstate commerce which the Sherman Act condemns. The Supreme Court held that a restraint as to sugar was *alleged,* but after the case came down, the allegation was point blank *denied.* This cast the burden upon the appellees of proving interstate effects if they could, and it likewise cast the duty upon the court of making a finding, *one way or the other,* upon this issue, vital in any anti-trust case. And this it did not do, *although recognizing that appellees had failed to prove their case in this vital particular.*

B. The Conclusions of Law and Judgment Against Appellant Are Not Supported by the Findings.

1. In Order to Warrant a Recovery in a Treble Damage Suit Under the Sherman Act, a Plaintiff Must Plead and Prove, and the Trial Court Must Find, That the Activities Complained of as Having Caused Him Damage, Had a Substantial Economic Effect Upon Interstate Commerce.

This principle is fundamental. Nothing is better settled than that in order to make out a case under the Sherman Act, a showing must be made that the activities complained of had an economic effect (and the cases say a *substantial* economic effect) upon interstate commerce (*Apex Hosiery Co. v. Leader,* 310 U. S. 469, 500-501 and cases cited; *Wickard v. Filburn,* 317 U. S. 111, 121-125.)

This means that the question of effect upon interstate commerce goes to the very heart of the action. A plain-

tiff in a treble damage suit must therefore not only plead and prove, but the court must *find* the existence of a substantial economic effect on interstate commerce; otherwise the findings support neither the conclusions of law nor the judgment as regards a pronouncement of an anti-trust violation. In this regard the instant case differs in no respect whatever from the host of cases where the appellate court has remanded for failure of the trial court to find specially upon a material issue, as required by Rule 52a, Federal Rules of Civil Procedure. (See, for instance, *Marlborough Corp. v. U. S.* (9 Cir.), 172 F. 2d 787; *Paramount Pest Control Service v. Brewer* (9 Cir.), 170 F. 2d 553, following *Times-Mirror Co. v. National Labor Relations Board,* 331 U. S. 789; *Dearborn National Casualty Co. v. Consumers Petroleum Co.* (7 Cir.), 164 F. 2d 332; *National Savings & Trust Co. v. Shutack* (D. C. Cir.), 139 F. 2d 371; *Helfer v. Corona Products* (8 Cir.), 127 F. 2d 612.)

2. The District Court Here Declined to Make Any Finding Whatever as to the Issue of Effect Upon Interstate Commerce; and It Repeatedly Eliminated or Deleted Findings Proposed by Appellees as to That Issue.

As we have seen, the District Court here not only *failed* to find as to any interstate effect; it *refused* to do so and clearly indicated that but for its (with all respect, erroneous) interpretation of the scope and effect of the Supreme Court decision on the former appeal, it would have found that the activities complained of did *not* affect interstate commerce. The record in this regard is graphic:

> "The Court (on motion to amend findings): I felt that the conspiracy between the refineries had as its real objective the control of the growers and to pre-

vent them from dealing with the refineries that he may have wanted to deal with. In other words, that it more or less limited the grower to the place where he could sell beets and prevented any competition in that respect; *but I didn't feel that it had any effect upon the price of sugar in interstate commerce.* That is the reason I put everything in my conclusions of law . . ." [R. 810.]

* * * * * * * *

"The Court: I am not making a finding of fact. *If I had made a finding at all I would have made a finding that it did not affect interstate commerce,* but I wouldn't do that in view of the Supreme Court's decision." [R. 811.]

* * * * * * * *

"The Court: I wouldn't be surprised if the court sends this case back for a specific finding of fact on the sugar, but I have felt I should not do that in view of the Supreme Court's decision." [R. 812.]

The foregoing colloquy throws considerable light upon the trial court's views with reference to the case and serves to highlight the effect of its (and we say this with all respect) basic misconception of the effect of the Supreme Court's decision in the *Mandeville* case. It refused to find that there had been any effect upon sugar, the interstate product, because the evidence was all the other way; and Judge Ben Harrison, if we may respectfully be permitted to say so, is not the type of man to bolster up a judgment by making findings in which he does not believe. On

the other hand, the court felt that it was constrained by the Supreme Court decision from making a finding of no effect upon interstate commerce; a matter which we sincerely trust will be clarified by the opinion of this Court.

It is also worthy of note that this record now presents the case precisely as both the District Court and this Court believed it to have been presented on the first appeal: a restraint as to the sugar beets with no restraint (proved or found) as to the sugar; which was emphatically *not* the case treated by the Supreme Court, as Mr. Justice Jackson was so careful to point out.

We now turn to the proposition that if the District Court had (as it refused to do) found an interstate effect as regards the sugar, such finding would have been contrary to the undisputed evidence.

3. If the District Court Had Found That the Activities Complained of Had a Substantal Economic Effect on Interstate Commerce, Such Findings Would Have Been Clearly Erroneous as Being Contrary to the Undisputed Evidence.

(a) *The Undisputed Evidence Was That the Activities Complained of Had No Effect Whatever Upon the Price, Supply or Competitive Conditions With Reference to Sugar, the Only Interstate Product Involved in the Case.*

Since the District Court in any event made no finding as to any effect upon the sugar, it is not necessary to belabor the above points. Suffice it to say that the follow-

ing testimony in this regard of the two sales managers of appellant stands undisputed:

J. B. Hayden (Eastern Sales Manager).

"Q. (By Mr. Works): Mr. Hayden, will you please state whether or not the fact that during 1939, 1940 and 1941 these growers were being paid on a joint net basis had any effect whatever on either the price or the supply or competitive conditions with reference to sugar? A. No, Sir." [R. 694.]

* * * * * * * *

"The Court: That is the best kind of evidence you can have, counsel, that he didn't know it and there was no change in his methods." [R. 697.]

M. W. Hardy (Western Sales Manager).

"Q. From your experience is it or is it not the fact that this situation where the beet growers were paid on a joint net during 1939, 1940 and 1941 had no effect whatever on either price or supply or competitive conditions with reference to sugar? A. As a matter of fact I didn't know it was in effect.

Q. The joint net? A. No." [R. 719.]

It follows that, as the District Court observed in the remarks which we have quoted above, had a finding on this subject been made, it should have been a finding that the activities complained of did not affect interstate commerce, which should have been followed by conclusions of law and judgment to the effect that the case did not fall within the purview of the anti-trust laws.

II.

The District Court Erred in Awarding Damages in the Amounts Specified in the Judgment.

A. The District Court Erred in Its Application of the Measure of Damages.

As we have seen, the District Court measured the damages for 1939 and 1940 on the basis of the excess of what Mandeville would have received per ton of beets on the basis of the average of appellant's single net returns from sugar[7] sold during the 1937 and 1938 crop years, over what Mandeville actually did receive under the joint net method; while for 1941 it allowed Zuckerman and Evans a flat 25¢ per ton over what they had already received under the joint net method for that year. In doing this, with all respect, the Court erred.

In the first place, it is an *a fortiori* proposition that, since there was neither proof nor finding that the activities complained of had any effect upon interstate commerce, substantial or otherwise, it certainly cannot be said that appellees were injured in their business or property "by reason of anything forbidden by the anti-trust laws" within the meaning of 15 U. S. C., Section 15.

This follows for the reason that the courts have uniformly held that the plaintiff in a treble damage action

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[7]Bearing in mind as to both the single and joint net methods, that the net returns from sugar sales determined the beet prices, which were computed on a "reach-back" basis at the close of the year in which the beets were delivered and the sugar sold. As Mr. Justice Jackson was quick to observe, the sugar prices were the base for the beet prices and not the reverse. The stabilization of the beet prices thus had no effect upon the sugar prices, for "the effects ran in the other direction," as Mr. Justice Jackson put it.

must first show a violation of the anti-trust laws (a combination in restraint of trade or commerce *among the several states*) plus damage to the plaintiff *proximately* resulting from the acts of the defendant *which constitute a violation of such laws.* (*Glenn Coal Co. v. Dickinson Fuel Co.* (4 Cir.), 72 F. 2d 885; *Peterson v. Borden Co.* (7 Cir.), 50 F. 2d 644; *Jack v. Armour & Co.* (8 Cir.), 291 Fed. 741.) And such actions are founded, not upon the mere existence of a conspiracy, but upon injuries which result from the commission of *forbidden* overt acts by the conspirators. (*Suckow Borax Mines, Consol., Inc. v. Borax Consol.* (9 Cir.), 185 F. 2d 196, 208.)

In the second place, it also follows that since there was neither proof nor finding of a substantial economic effect upon interstate commerce, appellees have wholly failed to show the injury to the public interest which the Sherman Act condemns. We say this for the reason that it is fundamental that the main purpose of the Sherman Act was to protect the public from monopolies and restraints of trade with reference to commodities passing in interstate commerce, and that the individual right of action conferred by 15 U. S. C., Section 15, was but incidental and subordinate. (*Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S. 165, 174; *Glenn Coal Co. v. Dickinson Fuel Co.* (4 Cir.), 72 F. 2d 885, 889; *Abouaf v. J. D. and A. B. Spreckels Co.* (N. D. Cal.), 26 Fed. Supp. 830, 833; compare *Lynch v. Magnavox Co.* (9 Cir.), 94 F. 2d 883, 891.)

The record is thus devoid of either proof or finding as to what the Supreme Court in the first Mandeville appeal (334 U. S. at 243) termed "the restraints put upon the public interest in the interstate sale of sugar," in conjunc-

tion with its holding (334 U. S. 244-246) that restraints as to the sugar were *alleged* and hence the amended complaint there under consideration stated a cause of action.

Since no interstate effects or effects adverse to the interstate public were either proven or found to have resulted from the activities here complained of, it follows that appellees, if injured at all, were not injured by any violation of the anti-trust laws under which they sued; and hence, upon the facts found, the District Court should have allowed them no damages whatever.

If we assume, however, that appellees did prove a substantial economic effect upon interstate commerce and resulting injury to the public interest by reason of the activities of the combination charged (which they did not) and that the Court, with substantial support in the evidence, so found (which it did not), the fact still remains that the correct measure of damages has not been applied to the facts of these consolidated cases.

1. The Measure of Damages Is the Difference Between the Amounts Actually Realized by Appellees, During the Three Crop Years Involved, From the Sale of Their Beets to Appellant, and What Would Have Been Realized by Them During Such Period in the Absence of the Combination Complained of.

The treble damage features of Section 4 of the Clayton Act envisage, first, an ascertainment by the Court of the actual damage suffered by the plaintiff from the act or acts causing him injury—no more and no less—plus a statutory trebling which is of course punitive in its nature.

The test is what would the plaintiff have received but for the acts of the combination shown to have injured him, less what, if any, he actually did receive during the period involved. Or, to put it in another way, the measure is the difference between the amounts actually realized and what would have been realized in the absence of the combination. This is the substance of the holdings in cases such as *Bigelow v. RKO Radio Pictures,* 327 U. S. 251, 262-3; *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U. S. 555, 561-2; *City of Atlanta v. Chattanooga Foundry* (6 Cir.), 127 Fed. 23, 27; *Straus v. Victor Talking Machine Co.* (2 Cir.), 297 Fed. 791, 799 *et seq.* And see, also, *American Co-op Serum Assoc. v. Anchor Serum Co.* (7 Cir.), 153 F. 2d 907, 911 *et seq.*

The principal difficulty confronting a court in the ascertainment of damages in a Sherman Act case lies in finding a reasonable norm or standard by which to admeasure, in terms of money, the detriment suffered by the plaintiff during the effective period of the combination. The search for a reasonable standard is required because of the settled principle that, while the plaintiff is not held to proof of his damages with mathematical certainty, since a reasonable approximation based on *relevant* data is all that is required, nevertheless it is still the law that even in a case "where the defendant by his own wrong has prevented a more precise computation [*and these are not such cases*], the jury may not render a verdict based upon speculation or guess-work." (*Bigelow v. RKO Pictures,* 327 U. S. 251, 264.)

2. Translated to the Facts of This Case, and Assuming, for Purposes of Discussion Only, That Injury From a Sherman Act Violation Was Both Proved and Found, the Proper Measure Is the Excess, if Any, Trebled, and as to Each of the Three Years Involved, of the Amounts Which Appellees Would Severally Have Received Had They Been Paid for Their Beets Upon the Basis of Appellant's Own (Single) Net Return From Sugar Sold From Its Clarksburg Factory, Over the Amounts Which They Severally Did Receive When Paid Upon the Basis of the Joint Net Returns From Sugar Sold From Appellant's Clarksburg Factory and From the Factories Operated by the Two Other Sugar Companies in Northern California.

In searching for a reasonable norm or standard in these cases (assuming for the purposes of discussion only a proven and found violation of the anti-trust laws proximately causing them damage), it is first necessary to determine just how appellees were adversely affected by the combination of which they complain.

The very nature of the concerted action supplies the answer to this. The only effect of the combination so far as the appellees were concerned was to substitute, during the three years in question, a joint (three company) net method of settlement with the growers in lieu of the single (appellant only) net method which had customarily been in use in the Clarksburg area in prior years and which was restored in 1942. The result is, that during the three years in question, appellant's growers were deprived of the benefits of being paid for their beets on the

basis of the net sugar returns of Clarksburg alone. As the Supreme Court put it, the effect of the uniform agreement was to "deprive the grower of the advantage of the individual efficiency of the refiner with which he deals" and "of the price that refiner received." (334 U. S. at p. 242.) Or as the Court also put it in stating the facts:

> "Because beet prices were determined for the three seasons with reference to the combined returns of the three refiners, the prices received by petitioners for those seasons were lower than if respondent, the most efficient of the three, had based its prices on its separate returns." (334 U. S. at p. 224.)

Measured in terms of money, the advantage of appellant's individual efficiency would of course be reflected in its own net returns from sugar sold. Therefore, again measured in terms of money, the effect of the use of the joint net was, purely and simply, to deprive the growers of the advantage of being paid on the basis of appellant's higher single sugar net, as compared with the joint net, in the years when appellant's single net was in fact higher than the joint net, which was in 1940 and 1941.[8] This, then is *how* appellees were damaged as to the years in which they are respectively interested, which in the case of *Mandeville* was 1939 and 1940; and in the cases of *Zuckerman* and *Evans,* 1941.

The next question is how to measure this injury or damage in terms of money. And it is perfectly obvious

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[8]In 1939, Mandeville received slightly more from the joint net than it would have from appellant's single net. The joint net in that year was 3.131¢ per pound of sugar; appellant's single net (Clarksburg) was 3.123¢. [R. 343-344.]

that unless appellees have shown that the figures going to make up Clarksburg's single net returns from sugar for the years 1939, 1940 and 1941, were in some way tainted or rendered unreliable by the operations of the combination, we have not only a norm or standard (the Clarksburg *single* nets for those years applied to the sugar tables customarily in use before, during and after (1942) the period of the combination) but, what is more, *the appellees' damages not only may be, but have been proven with mathematical certainty.*

Appellees apparently recognized the necessity of showing some disqualifying effect upon the 1939, 1940 and 1941 Clarksburg (single) sugar net figures, for at the trial they claimed (but wholly failed to prove) that the expense item[9] of freight on sugar to destination had been adversely affected by the combination complained of. [R. 424.]

Despite this lack of proof on appellees' part, appellant proved without contradiction that any increase in freight

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[9]For the convenience of the Court, there is appended hereto a copy of the exhibit appearing at R. 222-223, filed pursuant to stipulation [R. 212-214] dated April 13, 1950, which exhibit [hereinafter referred to as "Exhibit of April 13, 1950"] tabulates for the years 1937 through 1942 all items going to make up the net returns from sugar sold and sets forth the single net of each of the three companies for each of those years and the joint net for the three years during which it was in use (1939, 1940 and 1941). The Holly and Spreckels figures were furnished by those companies at the joint request of the parties hereto.

costs during the three years in question was clearly due to natural competitive causes in the light of supply and demand and world conditions, such as a bumper beet crop in the Clarksburg area during 1939, 1940 and 1941, resulting in a surplus of sugar available for shipment East, with added freight costs, the outbreak of the war in Europe in 1939, with resultant presidential lifting of sugar sales restrictions, dislocation of cane sugar sources after Pearl Harbor, with resultant demand for beet sugar, added demand by canneries and military establishments, and the like. [R. 685-707, 717-20.]

Without further going into detail, the record shows precisely nothing which tends to impeach or disqualify the use of the Clarksburg *single* sugar net receipts figure, as compared with the amounts actually received by appellees under the joint net method, in arriving at the amount of appellees' (assumed) actual loss. In this way they would be compensated to the exact cent for any loss sustained from having been deprived of the individual efficiency of appellant and of the price which appellant actually received for its sugar during the three years in question.

The difference per pound of sugar between the joint net and appellant's single Clarksburg sugar net during those three years was as follows [R. 343-4]:

		Joint Net	Clarksburg Single Net	Difference
(Crop Year)	1939	3.131¢	3.123¢	—0.008¢
	1940	3.160¢	3.163¢	+0.003¢
	1941	3.950¢	3.970¢	+0.02¢

These figures when extended to cover the individual appellees' beet tonnage and sugar content (as per the sugar tables in use before, during and after the three years in question) would result in the following amounts, each being the exact sum of which the particular appellee was deprived through the use of the joint rather than the Clarksburg single net:

[Exhibit K for Identification. See Discussion at R. 725-726.]

(Crop Years)	(1) Clarksburg Single Net	(2) Tons Beets Delivered	(3) Percent Sugar in Beets	(4) Price Per Ton	(5) Total Amount	(6) Amount Paid	(7) Difference Between Columns (5) & (6)
1939 Mandeville	3.123¢	22,355.6	18.25%	$4.7749	$106,745.75	$107,262.18	$516.43 gain
1940 Mandeville	3.163¢	25,430.3	15.55%	$4.0502	$102,997.80	$102,767.13	$230.67
1941 Zuckerman	3.970¢	14,144.7	15.47%	$5,3576	$ 75,781.64	$ 74,794.76	$986.88
Evans	3.970¢	4,401.7	17.53%	$6.1924	$ 27,257.09	$ 27,080.00	$177.09

Mandeville 1940 ($230.67) trebled = $ 692.01
Zuckerman 1941 ($986.88) trebled = $2960.64
Evans 1941 ($177.09) trebled = $ 531.27

Instead of making its award on the above precise basis, the District Court, apparently on the theory that these were cases where, in the language of the decisions, "the defendant's unlawful acts prevented the plaintiffs from making more precise proof" of damages, applied, as we have seen, the averaged 1937 and 1938 Clarksburg nets to the 1939 and 1940 Mandeville tonnage, while for 1941 it awarded Zuckerman and Evans a flat 25¢ per ton. In this, with all respect, the District Court erred.

(a) *These Are Not Cases Where Appellant's Acts Have Prevented Appellees From Making Precise Proof of Their Damages; the Amount of Such Damages, Ascertained by the Measure Properly Applicable to These Cases, Was Proven to the Penny.*

This distinction is of the utmost importance in these cases. Precise proof certainly was not prevented on any theory, for here the exact single Clarksburg nets for the very years in question have not only been proven, *they have been stipulated to.* [R. 344.] And there can be no question but that settlement on the Clarksburg single net basis *for the years in question* was precisely what the utilization of the joint net method cost the appellees—no more and no less. It therefore follows that unless the appellees showed (as they wholly failed to show) that the Clarksburg single nets were in some way tainted by concerted action to which appellant was a party, their proof of actual detriment has been *exact and precise.* Certainly mere agreement to utilize a joint net basis of settlement would in no way operate to taint or to disqualify the company's *single* net, computed in the same way it had been computed both before and after the period during which the joint net was employed. Yet, that is *all* that appellees proved. Their basic claim, that the conspiracy had resulted in increased freight absorptions was not only supported by no proof whatever but was shown by appellant to be without the slightest foundation in fact.

There is a wide distinction between cases where, due to the activities of the combination, a plaintiff is *unable* to prove his loss save by reference to other years and cases where, as here, the plaintiff is fully able to apply the exact method of payment used either before or after the exist-

ence of the combination to his own actual operations during the period of combination activity.

Certainly in a price-fixing case the plaintiff is entitled to the difference between what he actually received and the reasonable price which the particular commodity would have brought in a free market; the price he would have received "but for" the alleged conspiracy. The cases all so hold.

The burden was on appellees in these cases to prove what that reasonable price was. This is not open to dispute. Bearing in mind the charge that what they had been deprived of was the single net settlement, we find them proving, by stipulated evidence, precisely what that single net return was for each of the three years during which the *joint* net method was used. *Prima facie,* the difference between the single and the joint net applications was of course their measure of damages. In justice and in fairness and as a matter of plain common sense it could be nothing else.

The single sugar net return was of course the derivative of two factors: (1), the *gross* receipts from the sale of Clarksburg sugar, less (2) deducted expenses, which comprised federal excise tax, freight on sugar to destination and sales and marketing expense (all as detailed on the exhibit of April 13, 1950).

In order to rebut the *prima facie* showing of damages which appellees themselves had made, it was of course necessary for them to impeach it if they could by showing that asserted concerted action participated in by appellant had operated to depress the single nets for 1939, 1940 and 1941.

How they attempted to do this was extremely significant.

They did not attack the individual gross receipts from Clarksburg sugar at all. They confined their ostensible attack to the *single expense item of freight on sugar to destination.* And they *proved* nothing as to that item. This is significant for two reasons: (1) it amounts to a direct confession that the activities of the combination did not affect the price structure of sugar in the least (which was wholly in accord with appellant's proof); and (2) it affords an unanswerable argument against the utilization, as a yardstick, of the single nets for years other than 1939, 1940 and 1941.

In sum, *eight* out of the nine factors going to make up the Clarksburg single nets for the three critical years stand wholly unchallenged. [R. 426-427.] And as we have seen, *appellees proved nothing in derogation of the validity of the ninth (freight) factor.* Such being the case, we submit that any recourse to the single nets for other years, such nets being made up from factors wholly different (only the federal excise tax item showing any degree of constancy) from those concededly correct for 1939, 1940 and 1941, was not only wildly speculative, but proved nothing in the face of the exact proof of each of the nine factors going to make up the single nets for 1939, 1940 and 1941.

Paradoxically enough, the District Court itself recognized that, due to appellant's own interest in the net returns, there could not be any rational inference that appellant was deliberately operating so as to reduce its own profits:

> "It would be pretty hard for me to infer that they were deliberately cutting down their own profits." [R. 700.]

In the light of the foregoing, it certainly may not be said that these are cases where the conduct of the appellant has precluded the appellees from precise proof of their damages. The plain fact is that appellees' damages, the difference between the return from the joint and single nets for the three years in question, have been proven with absolute certainty; and, assuming liability, the District Court should have so held.

Two cases dealing with the direct and certain proof of damages attributable to action found to be unlawful, are *Straus v. Victor Talking Machine Co.* (2 Cir.), 297 Fed. 791 (cited with approval in *Story Parchment Co. v. Paterson Co.,* 282 U. S. 555, 565), and *American Co-op Serum Assn. v. Anchor Serum Co.* (7 Cir.), 153 F. 2d 907.

In the *Victor* case, combined action on the part of Victor and its distributors resulted in depriving Macy's of its right to the regular distributor's discount of 40, 10 and 2% off for cash. As a result, Macy's was compelled to buy at straight retail prices. As to this, it was held that Macy's was entitled to the difference between what it actually paid and what it would have paid *during the monopoly period* "but for" the activities of the combination, being of course the amount of the discount.

The *American Co-op Serum Assn.* case was a treble damage suit brought for violation of 15 U. S. C. A., Section 13(a)(c)(d) and (f). The specific charge was price cutting contrary to a marketing agreement permitted by the Federal Serum and Virus Act of 1913. The effect of the price-cutting was to compel plaintiff to lower its prices of serum from 75¢ per c.c. to 65¢ to meet the cut prices, unlawful under the Act, of its competitors. It was held that plaintiff was entitled to the difference between the 65¢ and 75¢ per c.c. per sale during the period of the price

cutting; in other words, the price it would have received "but for" the unlawful action.

So here, the appellees proved that "but for" the concerted action, they would have received payment on the basis of the Clarksburg single net during the three years in question instead of the joint net settlement which they did receive. They proved nothing more. And the District Court erred in not so deciding.

B. The Damages Actually Awarded Were Speculative and Inconsistent.

The utilization of the 1937 and 1938 Clarksburg nets in ascertaining the 1939 and 1940 Mandeville damages were speculative because the exact Clarksburg nets for those years were available, stipulated to and not shown to have been tainted in any particular by the effects of the combination shown. The utilization of the flat 25¢ per ton figure for the Zuckerman and Evans 1941 crops were speculative for the same reason, since the 1941 Clarksburg net was also available, stipulated to and untainted; and for the further reason that the 25¢ per ton figure was wholly unrelated to any evidence in the case; a true situation of "picking a figure out of the air."

Its inconsistency is shown by the fact that had the District Court used the same criteria for 1941 as it did for 1939 and 1940, namely, the 1937 and 1938 averaged Clarksburg nets, Zuckerman and Evans would have received nothing, for the joint net upon which they were actually paid for 1941 was higher than the averaged Clarksburg nets for 1937 and 1938. [R. 225; Exhibit of April 13, 1950, set forth in Appendix hereto.]

The result is that as to the District Court's findings as to damage for *each* of the three critical years, the lan-

guage of the Supreme Court, speaking through Mr. Justice Brandeis, in *Keogh v. Chicago & N. W. R. R. Co.,* 260 U. S. 156, has full application:

> "Finally, not only does the injury complained of rest on hypothesis (compare *International Harvester Co. v. Kentucky,* 234 U. S. 216, 222-224); but the damages alleged are purely speculative. Under §7 of the Anti-Trust Act, as under §8 of the Act to Regulate Commerce, *Pennsylvania R. R. Co. v. International Coal Mining Co.,* 230 U. S. 184, recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible for expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture . . ." (Pp. 164-165.)

For the reasons hereinabove given, it is respectfully urged that the judgment should be reversed and the cause remanded with appropriate directions to the District Court.

Respectfully submitted,

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APPENDIX.

COMPARATIVE TABULATIONS OF NET RETURNS FROM SALES OF SUGAR. [R. 222-223.]

[Exhibit of April 13, 1950]

	1937			1938			1939				1940				1941				1942		
	Crystal	Holly	Spreckels	Crystal	Holly	Spreckels	Crystal	Holly	Spreckels	Joint	Crystal	Holly	Spreckels	Joint	Crystal	Holly	Spreckels	Joint	Crystal	Holly	Spreckels
Gross receipts from sales, less cash discounts and allowances	$4.6387	$4.674	$4.6870	$4.3664	$4.225	$4.4151	$4.394	$4.261	$4.4328	$4.388	$4.450	$4.351	$4.5172	$4.455	$5.081	$5.116	$5.1550	$5.132	$5.313	$5.555*	$5.4916
Less:																					
Federal Excise Tax	.3506	.421	.3635	.5347	.534	.5350	.535	.534	.5350	.535	.535	.534	.5350	5.35	.535	.534	.5350	.535	.535	.535	.5350
Freight on sugar to destination	.2870	.284	.4482	.1912	.329	.5379	.438	.328	.5409	.479	.387	.488	.4749	.468	.322	.352	.3618	.352	.257	.373	.3741
Less sales and marketing expenses:																					
Insurance on sugar only	.0086	.015	.0060	.0159	.015	.0052	.014	.019	.0053	.009	.014	.007	.0061	.007	.007	.008	.0067	.007	.013	.....	.0095
State taxes and personal property taxes on sugar	.0428	.035	.0341	.0423	.023	.0238	.047	.022	.0157	.021	.078	.020	.0271	.031	.060	.039	.0341	.040	.057	.....	.0332
Storage on sugar (no charge is made for storage on sugar while in operating factory warehouses)	.0438	.023	.0293	.1085	.029	.0438	.092	.029	.0656	.060	.113	.075	.0603	.071	.052	.063	.0551	.056	.034	. . .	.0596
Loading, handling, reconditioning and additional cost of packing in small packages	.0828	.085	.0256	.0676	.052	.0255	.066	.048	.0519	.053	.065	.059	.0788	.071	.061	.075	.0844	.077	.076	. .	.1015
Brokerage and Commissions	.0467	.056	.0503	.0466	.054	.0509	.048	.053	.0507	.051	.048	.052	.0507	.051	.038	.043	.0422	.042	.038	.....	.0434
Miscellaneous, including sales department salaries and traveling expenses, advertising, telephone and telegraph expense, losses on accounts, etc	.0653	.024	.0725	.0623	.020	.0650	.031	.017	.0640	.049	.047	.021	.0864	.061	.036	.026	.1037	.073	.057	.....	1043
Net return from sales	$3.7111	$3.731	$3.6575	$3.2973	$3.169	$3.1280	$3.123	$3.211	$3.1037	$3.131	$3.163	$3.095	$3.1979	$3.160	$3.970	$3.976	$3.9320	$3.950	$4.246	$4.647**	$4.2310

* Cash discounts not deducted. ** Without deduction for cash discounts and sales and marketing expenses.

(NOTE: Figures are per hundred pounds of sugar. [Compare R. 306, 344.]